INDEX

	Page
Opinion Below, Jurisdiction and Statute Involved	1
Questions Presented	1
Statement	2
Reasons for Denying the Writ	7
I. The Decision Below Is Entirely Consistent with the Principles of Exhaustion of Administrative Remedies Announced by This Court	7
II. The Decision Below Is Limited to the Specific Facts and Claim of This Case and Does Not Impair the Administrative Disputes Procedures for Government Contract Claims	10
III. There Are Grounds Independent of the Court of Claims' Reasoning Which Make the Disposition of This Case by the Court Below Clearly Correct and Unexceptional	12
IV. The Decision Below Does Not Preclude the Government from Contesting Any Relevant Facts in the Remand Proceedings Before the General Services' Board of Contract Appeals ..	15
Conclusion	17
Appendix	1a

CITATIONS

Cases:

Briscoe v. *United States*, 194 Ct.Cl. 866, 442 F.2d 953 (1971)	11
Jacobson Construction Co., 66-2 BCA ¶ 6040 (GSBCA 1966)	13
Litchfield Mfg. Corp. v. *United States*, 167 Ct.Cl. 604, 338 F.2d 94 (1964)	15
Overstreet v. *United States*, 55 Ct.Cl. 154 (1920)	15
Pigeon v. *United States*, 27 Ct.Cl. 167 (1892)	15
Richardson Camera Co. v. *United States*, 199 Ct.Cl. 657, 467 F.2d 491 (1972)	11

Page

Robertson Electric Co. v. *United States,* 176 Ct.Cl. 1287 (1966) 8
Schlesinger v. *United States,* 181 Ct.Cl. 21, 383 F.2d 1004 (1967) 8
United States v. *Anthony Grace and Sons, Inc.,* 384 U.S. 424 (1966) 1, 6, 7, 8, 10
United States v. *Carlo Bianchi & Co.,* 373 U.S. 709 (1963) 6
United States v. *Hammer Contracting Corp.,* 331 F.2d 173 (2d Cir. 1964) 13
United States v. *Peter Kiewit Sons, Inc.,* 345 F.2d 879 (8th Cir. 1965) 13
United States v. *Ulvedal,* 372 F.2d 31 (8th Cir. 1967) .. 13
United States v. *Utah Construction & Mining Co.,* 384 U.S. 394 (1966) 6
Universal Ecsco Corp. v. *United States,* 181 Ct.Cl. 10, 385 F.2d 421 (1967) 8
William Green Construction Co., Inc. 68-1 BCA ¶ 6883 (GSBCA 1968) 2, 5
William Green Construction Co., Inc. 71-2 BCA ¶ 9116 (GSBCA 1971) 2, 3, 5
Zidell Exploration, Inc. v. *United States,* 192 Ct.Cl. 331, 427 F.2d 735 (1970) 8, 13

STATUTES:

Act of August 29, 1972, 86 Stat. 652 (P.L. 92-415), amending 28 U.S.C. 1492 10

REGULATIONS:

41 C.F.R. § 1-1.318 promulgated in 29 Fed. Register 10104, July 24, 1964, and currently recodified as 41 C.F.R. § 1-1.318-1 (1973) 5, 12

MISCELLANEOUS:

S. Rep. No. 92-1066, 92nd Congress, 2d Session 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1153

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM GREEN CONSTRUCTION CO., INC.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW, JURISDICTION, AND STATUTE INVOLVED

The Government's Petition sets out the opinion below, jurisdiction of this Court, and the statute involved. Pet. 1-2.

QUESTIONS PRESENTED

The question presented in this case is not that stated in the Government's Petition. Rather, the questions presented are:

1. Whether, consistent with this Court's recognition in *United States* v. *Anthony Grace and Sons,* 384 U.S.

424 (1966) that the general rule for exhaustion of administrative remedies in Government contract cases is not inflexible in the face of exceptional circumstances, the decision below, remanding this case for evidentiary proceedings before the administrative appeals board, correctly held that under the facts presented, respondents' claim for relief could be pursued before the proper administrative board; and

2. Whether, under a reasonable interpretation of the Court of Claims opinion, the Government is free to contest and present evidence on all relevant issues of fact in the ordered remand proceeding before the General Services Administration Board of Contract Appeals.

STATEMENT

Two contracts between the respondent William Green Construction Co. ("Green") and the United States through the General Services Administration (GSA) are interrelated in this case. One of the contracts called for the construction of a women's dormitory at Howard University (the "Howard contract"); the other, for the construction of a United States Post Office and Federal Office Building at Portsmouth, New Hampshire (the "FOB contract").[1]

[1] For the limited purpose of the issue of exhaustion of administrative remedies raised by the Government's Motion to Dismiss, the facts included in the complaint and documents before the Court of Claims in support of the motions to reconsider must be accepted as correct. Accordingly, this statement is based on the opinion of the Court of Claims (all citations are to the opinion reprinted in Petition Appendix), the complaint, documents included in the Appendix to this brief which were before the Court of Claims, and the two opinions of the GSA Board of Contract Appeals, reported at 68-1 BCA ¶ 6883 (1968) and 71-2 BCA ¶ 9116 (1971).

About a year into each contract, in late 1965 and early 1966, GSA insisted that respondent perform certain work on the Howard contract which was impossible to perform, thereby precipitating the present dispute. The respondent, unable to perform on the Howard contract, was terminated for default on April 14, 1966. Five years later, the GSA finally conceded that that default termination was improper and erroneous. *William Green Construction Co., Inc.*, 71-2 BCA ¶9116 (GSBCA 1971).

Immediately following the improper termination of the Howard contract, the GSA compounded this wrong by taking the position that it would no longer make progress payments to respondent for work it was performing on the FOB contract. GSA's position was that respondent was or would be susbtantially indebted to the Government for liquidated damages and anticipated excess completion costs under the Howard contract, as a result of the default termination of that contract. The GSA advised Green that it was going to offset that claim against the future progress payments that Green was otherwise entitled to receive for work it was performing under the FOB contract. In effect, the GSA told Green that because of the Howard University termination, the GSA henceforth was not going to pay Green for its FOB work. At this point, Green was still performing the FOB contract and was not in default in any way under that contract.

Green immediately advised the GSA that, without the benefit of the progress payments specifically provided by the FOB contract, it would be financially unable to continue work on that contract, since those progress payments were needed to pay the laborers

and material suppliers on that contract. Accordingly, Green requested the GSA to isolate the dispute under the Howard contract from performance of the FOB contract. This request was denied by the GSA Administrator, who personally refused to treat the two contracts separately and who confirmed the decision to set off the Howard contract claim against the FOB contract progress payments. At that point, respondent was forced to abandon its FOB contract. This abandonment was subsequently formalized by a GSA letter terminating respondent's FOB contract. Following the GSA's termination of all of Green's federal contracts, Green was forced to go out of business. Pet. App. 2a-3a.

Green's performance bond surety on the FOB contract, respondent United States Fidelity & Guaranty Co. ("USF&G") was then required to pay the excess cost of completing the FOB contract. Under its bond and indemnity agreement, Green is liable to USF&G for this cost.

Since the heart of the dispute in this case was the wrongful default termination of the Howard contract, Green filed a prompt and timely administrative appeal from the Howard termination to the GSA Board of Contract Appeals. This appeal requested relief not only from the default termination of the Howard contract, but also for the resulting loss sustained under the FOB contract. Subsequently the GSA moved to dismiss from the administrative appeal proceeding the claim for losses under the FOB contract. The GSA Board of Contract Appeals granted the GSA motion and dismissed the FOB contract claim on the grounds that it was a claim for breach

of contract over which the Board had no administrative jurisdiction, 68-1 BCA ¶6883.

The administrative appeal, thus reduced, was contested by the GSA for five years. In 1971, the GSA finally conceded, by stipulation, that it had wrongfully terminated the Howard contract. 71-2 BCA ¶9116. The GSA Board of Contract Appeals then remanded that case to the Howard University contracting officer to determine the "equitable adjustment" (relief) to be granted Green under the Howard contract. Since that proceeding, which is still pending, no longer included a claim for the FOB losses, the GSA's stipulation and the Board's remand decision specifically provided that the remand "shall not be prejudicial to [Green's] right to proceed in the Court of Claims for additional damages not the subject of such equitable adjustment." 71-2 BCA ¶9116. Pursuant to that Board action, respondents instituted the present suit in the Court of Claims to recover the losses sustained under the FOB contract.

One further fact must be noted with respect to the Government's present claim that Green should have filed a separate administrative appeal under the FOB contract within thirty days after the Government officially terminated that contract. That is the fact that the GSA's letter terminating the FOB contract did not state, as required by the Federal Procurement Regulations for all "final", appealable decisions, that it was "made in accordance with the Disputes Clause [of the Contract] and shall be final and conclusive . . . unless within thirty days . . . a written notice of appeal . . . is mailed or otherwise furnished to the Contracting Officer." *See* 41 C.F.R. §1.1.318 (1965). Accordingly, the letter terminating

the FOB contract did not give Green the normal notice that the Government would be taking the position that all right to relief for losses under the FOB contract would be forfeited, unless in addition to appeal under the Howard contract, it also filed a separate appeal under the FOB contract.

In 1972, Green and USF&G brought suit in the Court of Claims for breach of the Howard and FOB contracts. Upon consideration of the Government's Motion To Dismiss, Judge Davis, writing for an unanimous court, held that Green's FOB claim was a claim under the contract, which should be presented to the GSA Board of Contract Appeals, rather than a claim for breach over which the Court of Claims would have original jurisdiction.[2] Accordingly the Court of Claims granted the motion insofar as the complaint alleged breach of contract. With respect to the claim for relief under the contract, the Court of Claims held that Green would have to exhaust its administrative remedy and accordingly remanded that claim to the GSA Board of Contract Appeals for an evidentiary hearing on the merits. The Court of Claims found that, under the circumstances, the absence of a formal separate appeal under the FOB contract within the normal 30-day period did not pre-

[2] It is essential to understand the differences between the two types of contractor claims. Breach of contract claims are redressable only in a court of law or equity. No administrative procedures precede their redress. On the other hand, any claim for "equitable adjustments" which may be made "under" the contract, must be pursued first with the contracting officer, and then before the appropriate administrative board, after which review by the Court of Claims takes place. *See United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966); *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966).

clude administrative consideration of the claim. The Court of Claims also found, upon the basis of the Government's concession of error in terminating the Howard contract and the still undisputed fact of the Government's refusal to pay under the FOB contract, that as a matter of law Green's abandonment of the FOB contract was excusable. Subject to this single basic legal finding, the Court of Claims' opinion returns the case to the GSA Board of Contract Appeals for necessary fact finding.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THE PRINCIPLES OF EXHAUSTION OF ADMINISTRATIVE REMEDIES ANNOUNCED BY THIS COURT.

The Government's contention that the decision below is in "direct contravention" to this Court's decision in *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, is premised upon the inaccurate suggestion that the general rule for exhaustion of administrative remedies in Government contract claims is absolute and inflexible. To the contrary, in *United States* v. *Anthony Grace & Sons, Inc.* this Court specifically recognized that in certain factual circumstances the general rule for exhaustion would not apply. 384 U.S. at 429-430. The decision below recognized and reaffirms the general rule, but found that the facts of this case brought it within a recognized exception.

Even in recognizing this particular case as the exception to the general rule, the Court of Claims did not go as far as it might have under the exception recognized by this Court in *Anthony Grace.* The Court of Claims did not allow Green to bypass its

administrative remedy as is suggested might be done by the above referenced portion of the *Anthony Grace* decision. To the contrary, the Court of Claims remand order requires Green to present its claim before the GSA Board of Contract Appeals. This is exactly what this Court did in *Anthony Grace.* In all respects, therefore, the Court of Claims decision is consistent with the rule established by this Court, and does not represent any expansion of Court of Claims jurisdiction. Indeed, by remanding the case to the GSA Board of Contract Appeals, the lower court has deferred to the jurisdiction of that body.

Other than applying the general rule so as to require Green to return to the GSA Board of Contract Appeals, all the Court of Claims held in this case was that the administrative remedy was still available for exhaustion, notwithstanding the absence of a separate appeal under the FOB contract within the normal 30-day period. This limited holding is consistent with a line of Court of Claims decisions, dating back to 1966, allowing resort to the administrative remedies after expiration of the 30-day period when exceptional circumstances warrant. *See, e.g., Robertson Electric Co.* v. *United States,* 176 Ct. Cl. 1287, 1301-1302 (1966); *Universal Ecsco Corp.* v. *United States,* 181 Ct. Cl. 10, 20-21, 385 F.2d 421, 427 (1967); *Schlesinger* v. *United States,* 181 Ct. Cl. 21, 24, 383 F.2d 1004, 1005-1006 (1967); *Zidell Exploration, Inc.* v. *United States,* 192 Ct. Cl. 331, 335-336, 427 F.2d 735, 737-738 (1970). All these cases, like *Anthony Grace,* recognize that equitable and practical considerations, of necessity, require some flexibility in the administrative procedure for resolving government contract disputes.

In arriving at this result the Court of Claims emphasized that Green had filed a timely appeal from the termination of the Howard contract and that in that appeal it did raise its claim for losses under the FOB contract, thereby bringing the entire factual dispute before the Appeals Board. "The three federal contracts were linked in plaintiff's mind and it may have considered the enlarged recovery it originally sought in the Howard administrative proceedings to be a sufficient method of covering all three determinations." Pet. App. 9a, 10a. The court further noted the GSA Board of Contract Appeal's dismissal of the FOB claim from the Howard appeal, on the Government's motion, for lack of jurisdiction and pointed out this dismissal did not occur until 1968 by which time "the time for appealing the FOB and Training School contracts had long expired." Pet. App. 10a, n. 4. The lower court also points out that in 1968 there was a temporary confusion in the law over which Government contract claims were claims for breach of contract, to be pursued only in the Court of Claims, and which were claims for relief "under the contract", to be pursued before the Boards of Contract Appeal. The Court of Claims stated that this case is a "prime examplar" of that confusion over the proper characterization of a particular claim and the ensuing selection of remedy. Although this confusion has since been cured so as to maximize the jurisdiction of the boards, the Court of Claims correctly recognized that such confusion existed in 1966 and should be taken into account here.

Under all of the facts and circumstances involved, the lower court's conclusion, that "since plaintiffs appear to have a valid right to substantial further

relief, they should not be eternally punished for their initial mistaken choice of procedure," is in no way exceptional.

Given the fact that the Court of Claims has long held that the 30-day appeals period is not invariably jurisdictional to board consideration of a dispute, it is only logical that the Court of Claims used the new provisions of P.L. 92-415 to remand the case to the GSBCA. In doing this, the Court of Claims did not expand its jurisdiction; we agree with the Government that P.L. 92-415 was not meant to do that. However, P.L. 92-415 was designed to allow the Court of Claims directly to place a case before the proper administrative forum, rather than have to suspend court proceedings while the parties themselves began the administrative process. *See* S.Rep. 92-1066, 92nd Congress, 2d Session; 1972 *U.S. Code Cong. and Admin. News* 3116, 3118-3119. It is thus clear that, in the present case, all the Court of Claims did was to follow the direction which this Court itself followed in *Anthony Grace,* by returning Green to the GSA Board of Contract Appeals for fact finding by that body.

II. THE DECISION BELOW IS LIMITED TO THE SPECIFIC FACTS AND CLAIMS OF THIS CASE AND DOES NOT IMPAIR THE ADMINISTRATIVE DISPUTES PROCEDURES FOR GOVERNMENT CONTRACT CLAIMS

The Government's petition bypasses two crucial facts. First, the Court of Claim's decision does not grant final relief to respondents. To the contrary, it remands this case to the General Services Administration Board of Contract Appeals for a hearing to determine what relief, if any, is appropriate. Second, Judge Davis was careful to point out that even this limited result was dictated by the particular facts of

this case. This is evidenced by note 5 of the Court's opinion in which Judge Davis pointed out that:

> "The cases in which we refused contractors a second choice—*Briscoe* v. *United States,* 194 Ct. Cl. 866, 887-88, 442 F.2d 953, 966 (1971); *Richardson Camera Co.* v. *United States,* 199 Ct.Cl. —, 467 F.2d 491 (Oct. 1972)—presented very different facts and circumstances." Pet. App. 10a.

The facts which the Court of Claims in this case considered to be "very different", including the interrelationship between the Green contracts, Green's appeal under Howard raising the FOB claim, the Board's belated dismissal of the FOB claim for lack of jurisdiction and finally, the temporary post-*Bianchi* confusion over classification of claims and selection of remedy, are not reoccuring ones. By limiting its decision to these facts, the court below carefully avoided stating any general rule or precedent.

The instant decision, therefore, will not in any way impair the integrity of the administrative disputes procedure or the Government's ability to settle disputes under Government contracts. The Court of Claims' decision actually strengthens this integrity by remanding this claim to the General Services Administration Board of Contract Appeals for an evidentiary hearing to determine what relief, if any, is appropriate under the contract in this case.

With respect to the suggestion that the Government will be disadvantaged by an administrative hearing at this date and that this is somehow the fault of respondents, it need only be pointed out that Green filed its appeal under the Howard contract in 1966, that the Government did not concede its error

in that case until 1971 and the present suit was brought shortly thereafter. It is also noteworthy that, eight years after filing, the Howard appeal is still pending before the General Services Administration Board. This delay in the administrative proceeding is not attributable to respondent or to the Court of Claims decision in this case.

III. THERE ARE GROUNDS INDEPENDENT OF THE COURT OF CLAIMS' REASONING WHICH MAKE THE DISPOSITION OF THIS CASE BY THE COURT BELOW CLEARLY CORRECT AND UNEXCEPTIONAL

A. There has been no valid appealable decision under the FOB contract which would initiate the 30-day appeals period

An alternate and independent ground for the Court of Claims' disposition of the case is the fact that the government has never issued a valid final decision under the FOB contract which would trigger the 30-day appeal period. This fact was brought to the Court of Claims' attention when both parties sought reconsideration from the Court of Claims. The letter terminating the FOB contract (App. 2a) did not state as a "final decision" by regulation must, that it was intended as a final decision under the "disputes" clause of the contract from which an appeal must be taken within 30 days. As a result of this failure to satisfy the specific regulatory requirements for a final contracting officer's decision, Green was never given the requisite notice that it must appeal.[3] Both the GSA Board of Contract Appeals and

---

[3] The regulation in effect at the time the contract was terminated was codified as 41 C.F.R. § 1-1.318, promulgated in 29 Fed. Register 10104, July 24, 1964 and is currently recodified as 41 C.F.R. § 1-1.318-1 (1973). It reads as follows:

(a) When a final decision of the Contracting Officer concerns a dispute that is or may be subject to the disputes clause, a

the Court of Claims have held that a decision which fails to comply with these notice requirements will not be regarded as final for purposes of effectuating the general appeal requirement. *Jacobson Construction Co.*, 66-2 BCA ¶6040 (GSBCA 1966); *Zidell Explorations, Inc.* v. *United States*, 192 Ct.Cl., 331, 336, 427 F.2d 735, 738 (1970).[4]

Although the Court of Claims chose to base its decision in this case on other grounds, this fact alone would require the same result. Indeed, the absence of a valid final decision in this case renders the whole issue of exhaustion of administrative appeal remedies moot.

---

paragraph substantially as follows shall be included in the decision:

This decision is made in accordance with the Disputes Clause and shall be final and conclusive as provided therein, unless, within 30 days from the date of receipt of this decision, a written notice of appeal (in triplicate) addressed to the [title of the head of the agency] is mailed or otherwise furnished to the Contracting Officer. The notice of appeal, which is to be signed by you as the contractor or by an attorney acting on your behalf, and which may be in letter form, should indicate that an appeal is intended, should refer to this decision, and should identify the contract by number. The notice of appeal may include a statement of the reasons why the decision is considered to be erroneous.

[4] The cases cited by petitioner at 11, n.7, of its petition are completely distinguishable. In both *United States* v. *Ulvedal*, 372 F.2d 31 (8th Cir. 1967), and *United States* v. *Peter Kiewit Sons, Inc.*, 345 F.2d 879 (8th Cir. 1965), there were formal notices of a final contracting officer's decision; and the notices spelled out, as per the regulation in note 3, *supra*, exact appeal rights and time limits. In *United States* v. *Hammer Contracting Corp.*, 331 F.2d 173 (2d Cir. 1964), no such formal notice appears to have been given to the contractor; however, the contract predated 1964, when the regulation cited above was issued.

B. Other independent grounds support the Court of Claims disposition of the case

At least three other independent reasons exist for denying the Government's Petition. These in brief are:

(1) Green's timely appeal under the Howard contract, which included its FOB claim, constituted a constructive appeal under the FOB contract, particularly since the Government's refusel to pay under the FOB contract was premised solely on its termination of the Howard contract. Certainly the Howard appeal, including the claim for resulting losses under the FOB contract, gave the Government timely notice of that claim and an immediate opportunity to resist it before the Board.

(2) The Government is equitably estopped from contesting the timeliness of the FOB contract appeal to the GSA Board. By arguing strenuously before the GSA Board in the Howard appeal that all claimed losses under the FOB contract were "breach" claims redressable only in the Court of Claims (see *supra*, at 2-3), the Government should not now be allowed to argue to the contrary that these claims were redressable only before the Board of Contract Appeals which, on the Government's motion, originally dismissed them.

(3) Green's claims for losses under the FOB contract, based upon the Government's refusal to pay, is one which traditionally has been regarded as a breach of contract claim, not requiring *any* exhaustion of administrative remedies, and accordingly, the Government's motion to dismiss should have been denied completely. *See* the cross-petition for certiorari filed by Green and USF&G, February 25, 1974.

IV. THE DECISION BELOW DOES NOT PRECLUDE THE GOVERNMENT FROM CONTESTING ANY RELEVANT FACTS IN THE REMAND PROCEEDINGS BEFORE THE GENERAL SERVICES BOARD OF CONTRACT APPEALS

Reasonably interpreted, within the procedural context in which it was rendered, the Court of Claims decision does not make any final findings as to disputed facts or preclude the Government from contesting any relevant facts in the proceedings before the GSA Board of Contract Appeals, pursuant to the court's remand. The only two critical facts are indeed undisputed. They are, first, the fact that the Government's termination of the Howard contract was wrongful by the Government's admission, and, second, the fact that upon the basis of the wrongful termination of Howard, the Government took the position that it was not going to make further payments to Green under the FOB contract. Even the Government's Petition concedes these two facts, as it must. The Court of Claims properly recognized that under the most fundamental principles of contract law, one party's refusal to pay for work under a contract excuses the other from further performance. "It follows, we think, that Green's refusal to proceed on FOB must now be held to be excused . . . . Construction contractors cannot be expected to continue working if the Government improperly holds back on substantial interim payments which enable the project to proceed. *Cf. Litchfield Mfg. Corp.* v. *United States,* 167 Ct.Cl. 604, 338 F.2d 94 (1964); *Pigeon* v. *United States,* 27 Ct. Cl. 167, 175-76 (1892); *Overstreet* v. *United States,* 55 Ct.Cl. 154, 173-74 (1920)." Pet. App. 11a [Footnote omitted]. This conclusion is one of law and is so firmly established as to be unassailable.

Beyond this point, a reasonable interpretation of the lower court's opinion leaves all facts to be determined by the GSA Board of Contract Appeals and subject to contest and presentation of relevant evidence by the Government. The Court of Claims' opinion and remand order clearly require respondents to prove all costs and damages sustained as a result of the termination of the FOB contract. Other factual references in the Court of Claims' opinion must be considered within the procedural context of a Motion of Dismiss and viewed as assumptions for purposes of dealing with the legal issues raised by the Motion—not as final findings of facts which the Government might legitimately dispute. This is most clearly evidenced by the Court of Claims' Order on the Government's Motion for Reconsideration in which the Court of Claims, after noting a factual allegation which the Government had not denied, stated "We proceed *at this stage* on that *assumption.*" Pet. App. 14a [Emphasis added] This is not the language used for final findings of fact. Rather it simply connotes the ordinary assumption made in considering motions to dismiss—assumptions which must be supplemented by proof and are subject to evidentiary challenge in the ensuing evidentiary proceeding before the administrative board.

In short, properly read within its procedural context, the decision below does not make findings on disputed material facts without evidence. Nor does it usurp the fact finding function of the GSA Board of Contract Appeals in the remand proceeding. To the extent the Government has a legitimate basis for opposing respondents' claim in this case, it will have a full and fair opportunity for doing so in the sched-

uled remand proceeding before the administrative tribunal.

CONCLUSION

The decision below is correct for the reasons stated by the Court of Claims and for additional reasons including those mentioned above. Subject to the fundamental rules of evidence, the Government is free to raise and present evidence on any relevant defense in the scheduled remand proceeding before the General Services Administration Board of Contract Appeals. Interim remand to the Court of Claims on this issue would serve no useful purpose and would only further delay the administrative proceeding.

For the foregoing reasons respondents submit that the Petition in this case should be denied.

Respectfully submitted,

MICHAEL J. MALLEY
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Of Counsel:

STANLEY C. MORRIS, JR.
JAMES V. DOLAN
VIRGINIA M. DONDY
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

February, 1974